IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

FIRST APPEAL NO.24 OF 2022
AND
CROSS OBJECTION NO.42 OF 2022

FIRST APPEAL NO.24 OF 2022
Kisan Chafala Rathod,
age 61 years, occupation retired clerk,
r/o Narayanwadi, Pusad, taluka Pusad,
district Yavatmal. ….. Appellant.

:: V E R S U S ::

Atmaram Chafala Rathod,
age 65 years, occupation agriculturist,
r/o Shivaji Park, Pusad, taluka Pusad,
district Yavatmal. ….. Respondent.

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Shri P.S.Patil, Counsel for the Appellant.
Shri P.A.Kadu, Counsel for the Respondent.

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CROSS OBJECTION NO.42 OF 2022
Atmaram Chafala Rathod,
age 65 years, occupation agriculturist,
r/o Shivajipark, Pusad, taluka
Pusad, district Yavatmal. ….. Cross objector.

:: V E R S U S ::

1. Kisan Chafala Rathod,
age about 55 years, occupation retired clerk,
r/o (Narayan Wadi),
Pusad, taluka Pusad, district
Yavatmal.

2. Virsing Bhiwasing Chavan,
aged 56 years, occupation agriculturist,
r/o Rajana post Bhandari,
taluka Pusad, district Yavatmal,

(dead). ..... **Respondents**.

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Shri P.A.Kadu, Counsel for the Cross Objector.
Shri P.S.Patil, Counsel for Respondent No.1.

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CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 24/04/2023
PRONOUNCED ON : 08/06/2023

JUDGMENT

1. By this appeal, the appellant has challenged judgment and order dated 23.11.2021 passed by learned Joint Charity Commissioner, Amravati Division, Amravati in Enquiry Case No.13/2014.

2. Brief facts necessary for disposal of the appeal are as under:

Harisingh Naik Education Society is registered under the Maharashtra Public Trusts Act and the Societies Registration Act bearing No.F-640, Yavatmal. Respondent - Atmaram Chafala Rathod, is member of the said society and is an interested person. He is also trustee and the president of the said society. The appellant was also member of the said society and was elected as the secretary of the said society in the year 1985. His name was also registered as the secretary in the PT Register. The said society is also running one high school namely Babasaheb Naik High School and one hostel namely Harsingh Naik Backward Class Hostel at Parwa Bz., taluka Pusad, district Yavatmal. As per the bye-laws of the society, the executive committee is consisting of 11 members.

3. On 3.11.2014, the respondent has filed proceeding under Section 41D of the Bombay Public Trusts Act against the appellant alleging that the appellant is involved in malfeasance and misappropriation of funds of the society and accordingly prayed for conducting an enquiry against the appellant and one Veersingh Chauhan. On receipt of notice of the proceeding, the appellant resisted the application and denied the allegations. After considering rival submissions of both the sides, learned Joint Charity Commissioner has framed four charges against the appellant. The said charges are as follows:

> 1. that you the non-applicants being trustees of the society committed persistent default in submission of account and audit reports in the

office of the Assistant Charity Commissioner, Yavatmal.

2. that you the non-applicants being trustees of the society by misusing position as secretary of the society remained absent from scheme and signed the attendance register by pressurizing the headmaster of the school.

3. that you the non-applicants being trustees of the society by misusing position as secretary of the society pressuring the headmaster to submit his salary bills without doing any work and committed misfeasance and breach of the trust.

4. that you the non-applicants being trustees of the society prepared bogus resolution dated 11.8.2013 and withdrawn amount of Rs.3,000/- from the account of the society lying in Yavatmal District Cooperative Bank at Yavatmal and thereby committed malfeasance.

4. In support of the charges, the respondent has adduced his evidence vide Exhibit-18. The respondent has also adduced the evidence of PW2 Manoj Dele. Besides the oral evidence, the respondent has placed on record Schedule-I Exhibit-8, account extract of account of the society Exhibit-68, resolution Exhibit-21, letter to the headmaster dated 4.4.2016 Exhibit-22, letter to the Education Officer, Yavatmal Exhibit-23, letter to the Education Officer dated 25.5.2018 Exhibit-24, notice of general meeting dated 15.1.1998 Exhibit-14, resolution passed in general meeting dated 3.2.1998 Exhibit-26, notice of general meeting dated 15.1.2003 Exhibit-42, resolution passed in general meeting 3.2.2003 at Exhibit-27, notice of general meeting dated 15.1.2008 Exhibit-43, resolution passed in general meeting dated 3.2.2008 vide Exhibit-28, letter issued by the respondent to the appellant dated 19.5.2013 Exhibit-29, postal acknowledgement dated 21.5.2013 Exhibit-30, resolution passed on 11.8.2013 Exhibit-32, letter issued to the Yavatmal District Central Cooperative Bank at Jambazar Exhibit-33, postal acknowledgement dated 16.1.2014 Exhibit-34, written complaint to the Pusad Police Station Exhibit-35, N.C. registered against the appellant

Exhibit-36, resolution passed in meeting of the executive committee Exhibit-37, resolution passed in meeting of executive committee dated 6.11.2012 Exhibit-38, resolution passed in executive committee dated 10.6.2013 Exhibit-39, and resolution passed in meeting of the executive committee Exhibit-40.

5. The appellant has also adduced his evidence vide Exhibit-71 and placed reliance on letter issued to the president of the society Exhibit-79, postal acknowledgement Exhibit-81, resolution passed by the executive committee on 12.6.2012 Exhibit-37, letter issued to the president dated 15.5.2012 Exhibit-82, postal acknowledgement Exhibit-84, application filed by the trustees addressed to the president Exhibit-85, postal acknowledgement Exhibit-87.

6. After appreciating the entire evidence of both the sides, learned Joint Charity Commissioner held that charge Nos.1 to 3 are not proved, however the respondent has proved that on 11.8.2013 the appellant has withdrawn amount of Rs.3000/- from the account of the society and

thereby committed malfeasance and thereby suspended the appellant as trustee and his membership was also cancelled.

7. Being aggrieved and dissatisfied with the judgment and order of suspension, the present appeal is preferred by the appellant on the ground that the action under Section 41D of the Bombay Public Trusts Act is of a serious in nature and strict proof is required to prove the charges. However, the respondent failed to prove the charges beyond reasonable doubt as there is no sufficient evidence to establish the fact that the appellant has committed any misappropriation of Rs.3000/- in the matter. It is further submitted that the appellant himself has admitted that he has withdrawn Rs.3000/- from the society's account for purchase of vegetables required for the students in pursuance of the resolution dated 11.8.2013. Learned Joint Charity Commissioner has held that the resolution is bogus one only on the ground that the appellant has not sent notice to the respondent and secondly the wife of the appellant who was not member of the society was present in the said meeting. In fact, learned Joint Charity Commissioner failed to appreciate that out of 11 members, 8 members were present

in the meeting who have consented the appellant while passing the resolution and permitted the appellant to withdraw amount of Rs.3000/-. The appellant further raised the ground that admittedly from the year 1998 the change reports are pending before learned Assistant Charity Commissioner and the same are yet to be finalized. The appellant has served the notice of meeting to the respondent by the registered post. However, inadvertently, counsel for the appellant has not filed the relevant documents before learned Joint Charity Commissioner to show that the notice was served upon the respondent. As per contentions of the appellant, the relevant documents are not produced before the court by his counsel though he has handed over the said documents and, therefore, the enquiry is to be remitted back to learned Joint Charity Commissioner for rehearing.

8. The appellant has also filed Civil Application No.377/2023 seeking permission to produce additional documents under Order XLI Rule 27 of the Code of Civil Procedure.

9. The respondent has also filed cross objection on the ground that learned Joint Charity Commissioner failed to appreciate that the appellant has committed default in submission of audited statement to the office of learned Assistant Charity Commissioner at Yavatmal. The audited statements of the society were not prepared by the appellant and not filed in the office of learned Charity Commissioner since 1985. Thus, the appellant has committed default while performing his duty. The appellant has misused the position as secretary of the society and, therefore, learned Joint Charity Commissioner ought to have held that charge Nos.1 to 3 are also proved against the appellant.

10. There is no dispute that the appellant and the respondent both are members of the society and the respondent was elected as the president, whereas, the appellant was secretary of the said society. Learned Joint Charity Commissioner proceeded with the enquiry on the basis of the application filed by the respondent alleging the malfeasance and misfeasance against the appellant. Learned Joint Charity Commissioner allowed the parties to lead evidence in the context of various charges levelled against the

trustees. Out of four charges, learned Joint Charity Commissioner held that charge No.4 that the appellant has withdrawn amount of Rs.3000/- on the basis of bogus resolution was held to be proved. The remaining charges that the appellant has committed default in submission of account and audit reports in the office of learned Assistant Charity Commissioner are held as not proved. The charge that the appellant being trustee has misused the position and failed to sign the attendance register and pressurized the headmaster to submit his salary bills is held as not proved.

11. Learned counsel Shri P.S.Patil for the appellant vehemently submitted that the allegation that the appellant has withdrawn the amount on the basis of bogus resolution itself is not proved. In fact, the entry in the PT Register of the society shows that out of 11 members, 8 members were present in the said meeting and resolution was passed in their presence. By the said resolution, powers are given to the present appellant to withdraw amount of Rs.3000/- for meeting the expenses for purchasing the vegetables for the hostel. None of members made any grievances that they were not present in the said meeting. In fact, he has also

issued the notice to the respondent and the same was duly received by the respondent on 9.8.2013. He had handed over the said documents to his counsel which are inadvertently are not filed on record. Learned Joint Charity Commissioner had not considered that the respondent has not adduced any evidence to show that the resolution was bogus one. He submitted that though the proceeding under Section 41D of the Bombay Public Trusts Act is not criminal proceeding, yet proof required to sustain the charges is of high standard.

12. In support of his contentions, learned counsel Shri P.S.Patil for the appellant placed reliance on the decisions in the cases of **Mallikarjuanappa s/o Sidramappa Bidve and others vs. Joint Charity Commissioner, Maharashtra State, Mumbai and others, reported in 2008(1) MhL.J. 148; Shri Eknath Tukaramji Pise and anr vs. Shri Rama Kawaduji Bhende and ors, reported in 2020(6) ALL MR 582,** and **Mukund Waman Thatte vs. Sudhir Parshuram Chitale and ors, reported in 2012(3) Mh.L.J. 322** wherein it has been held that for taking drastic action of removal, suspension, and dismissal from the post of the trustees, a very high degree of proof is required and the person seeking removal has to prove that

irregularities within the scope of Section 41D(1) are proved without any manner of doubt. Unless and until the lapse on the part of the trustees is proved to be actuated by dishonesty, a drastic action under Section 41D of the Bombay Public Trust Act is not warranted.

13. *Per contra*, learned counsel Shri P.A.Kadu for the cross objector submitted that the appellant was member of the society since 1985. The election of the managing committed was held in the year 1993 for the period of 1993-1998. The appellant was elected as secretary of the society. As per bye-laws of the society, the appellant has to take consent of the president for calling the meeting of the managing committee. As per the bye-laws of the society, it was not the responsibility of the secretary to call the meeting of the managing committee. The appellant has called the meeting without any authority on 11.8.2013 without serving any notices and the proceeding of the said meeting dated 11.8.2013 was prepared falsely to capture the funds and property of the society. Thus, the appellant has prepared bogus proceeding of the said meeting dated 11.8.2013. He further submitted that the appellant has committed various

acts of malfeasance and misfeasance and also committed misappropriation of the funds. He has also not submitted the audit reports and, therefore, the action of suspension by learned Joint Charity Commissioner is correct one and no interference is called for. He further submitted that the respondent has filed the cross objection as learned Joint Charity Commissioner illegally held that charge No.1 to 3 are not proved against the appellant.

14. In support of his submissions, learned counsel Shri P.A.Kadu for the cross objector placed reliance on the decision of the Honourable Apex Court in the case of **Janatha Bazar vs. Secretary, Sahakari Noukarara Sangha etc., reported in 2000 AIR (SC) 3129** wherein it has held that once act of misappropriation is proved may be for small or large amount, there is no question of showing uncalled sympathy and reinstating the employees in service.

He further placed reliance on the decision of this court in the case of **Dattatraya s/o Shrikrishna Mahajan vs. The Judge, Industrial Court, Amravati and anr** in Writ Petition No.3578/2005 decided on 29.9.2009 wherein also it is held that once an act of misappropriation is proved, there is no question of showing uncalled for sympathy.

He further placed reliance on the decision in the case of **Tukai Devi Trust and ors vs. Nivrutti P.Mujuml and ors reported in 2015(2) ALL MR 377** and **Gopal Krishnaji Ketkar vs. Mohamed Haji Latif, reported in 1968 AIR (SC) 1413**.

On the basis of the observations of the Honourable Apex Court and this Court, learned counsel submitted that there is no merit in the appeal and the appeal deserves to be dismissed.

15. The following substantial questions of law arise for consideration:

(1) whether the respondent has proved that the appellant has withdrawn amount of Rs.3000/- on the basis of bogus resolution dated 11.8.2013?

(2) whether the respondent has proved that the appellant has committed the default in submission of the account and audit reports and thereby committed dereliction in duties?

(3) Whether the enquiry is to be remitted back for rehearing?

16. Before I proceed to consider the rival submissions, it may be made clear that learned Joint Charity Commissioner has held that the charges regarding dereliction in duties and other charges of malfeasance or malfeasance are not proved. Learned Joint Charity Commissioner has held that the appellant has withdrawn amount of Rs.3000/- on the basis of the bogus resolution. Learned Joint Charity Commissioner has observed that the appellant has not produced the notices issued to the respondent regarding the meeting dated 11.8.2013. He also admitted that he has prepared the new proceeding book which is produced. Thus, the evidence shows that after 1993 till 2014 there was no election of the society and therefore, the appellant ought to have issued the notices to the respondent who was the president before passing resolution regarding the policy decision. Admittedly, none of members who were allegedly present in the meeting has challenged the said resolution. The respondent has not adduced any evidence to show that these 8 members were not present in the said meeting. Learned Joint Charity Commissioner has come to conclusion only on the basis that

no notice was served on the respondent and one trustee namely Gopaldas Agrawal.

17. The legal position, which may be kept at back of the mind, is that removal of a trustee is a drastic action. The charge of malfeasance and/or misfeasance is serious one. The proceedings are of quasi civil and quasi criminal nature. Though the proceedings under Section 41D of the Bombay Public Trusts Act is not criminal proceeding as such, yet, proof required to sustain the charges is of high standard. The standard of proof in such proceedings is some what more than normally required in cases governed by preponderance of probabilities. The imputation reflecting integrity of the trustees has to be proved by proof of high degree showing the dishonesty of the said trustees who are guilty of malfeasance or misfeasance. This court in the case of **Shri Eknath Tukaramji Pise and anr vs. Shri Rama Kawaduji Bhende and ors** cited supra by referring the judgment of **Mallikarjuanappa s/o Sidramappa Bidve and others vs. Joint Charity Commissioner, Maharashtra State, Mumbai and others** cited supra held that the imputation reflecting on integrity of trustees have to be fortified by proof of high degree which

would be somewhere in between standard of proof required in civil proceedings. Unless and until the lapse on the part of the trustee is proved to be actuated by dishonesty, a drastic action under Section 41D is not warranted. The same ratio is laid down by this court in the case of **Mukund Waman Thatte vs. Sudhir Parshuram Chitale and ors** cited supra wherein it has been held that the scope of enquiry under Section 41D will have to be considered. For taking drastic action of removal, suspension, and dismissal from the post of the trustees, a very high degree of proof is required and the persons seeking removal have to prove that irregularities within the scope of Section 41D (1) are to be proved without any manner of doubt.

18. Here, the respondent has alleged misfeasance on the part of the present appellant. The expression 'misfeasance' as used in clause (c) of Section 41D of the Bombay Public Trust Act would imply commission of breach of trust. It is more than mere negligence of the trustee to perform his duty. "Misfeasance" includes breach of duty by the trustee which would result into loss to the trust or would cause unlawful gain to such a trustee, charged with act of

misfeasance. The respondent has alleged that the appellant has withdrawn amount of Rs.3000/- from the account of the society on the basis bogus resolution. As per the submission of learned counsel Shri P.S.Patil for the appellant, out of 11 members 8 members were present in the said meeting dated 11.8.2013 who have consented while assigning the power to the present appellant to withdraw the amount. He submitted that learned Joint Charity Commissioner has held that the appellant has withdrawn the amount on the basis of bogus resolution. In fact, to prove the bogus resolution, the respondent has not adduced evidence of any member who were present in the said meeting. As per the allegation, the respondent who was president and one Gopaldas Agrawal who was vice president were not present in the said meeting and notices of the said meeting were not issued to them. Learned Joint Charity Commissioner has held that the appellant has not adduced any evidence to show that the notices were issued. Learned counsel Shri P.S.Patil for the appellant submitted that in fact the notices were issued to the respondent and the vice president the appellant have handed over the notices to his counsel. However, the said evidence was not produced by the counsel and, therefore, the appellant filed the present civil application seeking permission to produce additional evidence under Order XLI Rule 27 of the Code of Civil Procedure. He submitted that in view of Order XLI Rule 27 of the Code of Civil Procedure, the appellate court has power to allow a document to be produced and a witness to be examined. Whereas, learned counsel Shri P.A.Kadu submitted that the application under Order XLI Rule 27 is itself not maintainable as after sufficient opportunity, the appellant failed to adduce the evidence.

19. The general principle is that the appellant should not travell outside the record of the lower court and cannot take any evidence in appeal. However, in exceptional cases the appellant court may permit additional evidence only if the conditions laid down in Rule 27 exist. In view of Order XLI Rule 27, the additional evidence is permitted when (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the

exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or (b) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause, the appellant court may allow such evidence or document to be produced, or witness to be examined.

20. Thus, under Order XLI Rule 27 of the Code of Civil Procedure, the appellant court has power to allow documents to be produced and witness to be examined. This provision does not entitle the appellate court to lead a fresh evidence at the appellate stage. Thus, for the satisfactory reasons, for non-production of the evidence in the trial court, additional evidence can be permitted to be adduced.

21. In the present case, the appellant has come with a specific case that he has handed over all the documents to his counsel, but the counsel has not produced the same. He has submitted those documents to show that he has issued notices to the respondent and the respondent has received the said notice, but the appellant could not adduce the

evidence due to the default on the part of his counsel. Thus, the case of the appellant is covered under Order XLI Rule 27 clause (aa) of the Code which says that after exercise of the due diligence, the parties seeking to produce additional evidence could not produce the same.

22. In this view of the matter, Civil Application No.377/2023 deserves to be allowed.

23. The respondent had filed the cross objection against the finding of learned Joint Charity Commissioner in respect of several charges held as not proved. It is specifically observed by learned Joint Charity Commissioner that the respondent has admitted that the record was in his possession. The respondent has not examined auditor. It is further observed that regarding other two charges that the appellant pressurized the headmaster, the headmaster was not examined. It further revealed from the evidence that there was dispute between the president and other members regarding the possession of the record. The respondent has also not taken any step being the president to submit a audit report.

24. As far as charge No.2 is concerned, that the appellant has pressurized the headmaster, the headmaster is the best witness who is not examined. Therefore, the contention of the learned counsel that learned Joint Joint Charity Commissioner erroneously held that the charges are not proved is not sustainable.

25. It is further submitted by learned counsel Shri P.A.Kadu that the appellant who was secretary has no right to call the meeting. The scheme of the society is on record. As per the said scheme, the duties of the secretary are determined which specifically state that the secretary in consultation with the president or where he feels appropriate can call the meeting. The entire responsibility of the meeting is of the secretary and accordingly he has to prepare all the documents and information for the said meeting. Thus, in view of the scheme, the appellant is the authorized person to call the said meeting.

26. As far as the contentions of the respondent are concerned, that no notice was issued to him as well as to the vice president and no meeting was held and the appellant has

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withdrawn the amount on the basis of bogus resolution, the aspect of notice admittedly is not proved by the appellant by producing the documents on record. As per the appellant, he handed over the said documents to his counsel, but his counsel has not produced the same and prayed for the remand of the matter. Admittedly, the members who were present in the said meeting have not made any grievances and the respondent has also not adduced the evidence to show that the other members were also not present in the said meeting. In fact, resolution passed and recorded in proceedings book shows that the members who present in the meeting consented for giving powers to the appellant regarding the monitory transaction of the trust. The name of the member who suggested the proposal is also mentioned as Awachit Pawar. The said suggestion was supported by member Bhikaram Rathod. These two persons have not come forward to show that they were not present in the said meeting. The original documents also show that the entry regarding the said resolution was taken in the proceeding book. Whether the resolution was bogus and whether the notice was issued or not, are based upon the evidence in the nature of whether the notice was issued to the respondent and the acknowledgement of receipt of notice. From the record it reveals that the appellant has taken efforts and shown his due diligence to produce the said documents, but it was his counsel who has not produced the said documents. Learned Joint Charity Commissioner has taken drastic action only because the appellant failed to adduce evidence regarding service of notice. As far as the presence of his wife is concerned, her application was pending to add her as member. From the language of Section 41D of the Bombay Public Trusts Act, it is clear that learned Charity Commissioner may either on application of the trustee or any person interested in the trust, or on receipt of report under Section 41B or suo motu, may suspend, remove or dismiss any trustee of a public trust, if he continuously neglects his duty or commits any malfeasance or misfeasance or breach of trust in respect of the trust under clause (c) of sub section (1) of Section 41D of the Bombay Public Trusts Act.

27. In the above backdrop, the proper opportunity is to be given to the appellant to adduce the evidence. This court does not want to go into the merits whether action is

legal or not. As already observed that for taking drastic action of removal, suspension, dismissal, a very high degree of proof is required which is not adduced in the present case. The removal or the suspension is to be proved by the person within the scope of Section 41D of the Bombay Public Trusts Act beyond any doubt. Unless and until the lapse on the part of the trustees is proved to be actuated by dishonesty, a drastic action under Section 41D of the Bombay Public Trust Act is not warranted. Therefore, without touching to the issue whether the appellant has committed malfeasance or misfeasance, in the above facts and circumstances, the matter is to be remanded back to learned Charity Commissioner to decide the matter afresh on charge No.4.

28. In this view of the matter, this Court passes following order:

ORDER

(1) The first appeal is allowed.

(2) The judgment and order dated 23.11.2021 passed by learned Joint Charity Commissioner, Amravati Division, Amravati in Enquiry Case No.13/2014 is set aside.

(3) Civil Application No.377/2023 is allowed and disposed of.

(4) Cross Objection No.42/2022 is dismissed.

(5) The matter is remanded back to learned Joint Charity Commissioner, Amravati Division, Amravati to decide the matter afresh on charge No.4 considering the law laid down by this Court in the case of **Mukund vs. Sudhir Parshuram Chitale and others** cited *supra*.

(6) Learned Joint Charity Commissioner, Amravati Division, Amravati shall give an opportunity to both the sides to adduce additional evidence, if parties apply for the same.

The first appeal and the cross objection stand disposed of.

(URMILA JOSHI-PHALKE, J.)

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